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BRIEF FOR PLAINTIFF IN ERROR.

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DETROIT:
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In the Supreme Court of the United States.

THE DETROIT CITIZENS' STREET RAILWAY COMPANY,
Plaintiff in Error,
vs.
THE CITY OF DETROIT, and THE DETROIT RAILWAY,
Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR.

HISTORY OF THE CASE.

This case originated in the Circuit Court for the County of Wayne, in Chancery, State of Michigan, by bill in equity filed by the plaintiff in error, to restrain the defendants from infringing upon the right of the plaintiff in error to construct and operate street railways in the streets, avenues and public places in the City of Detroit.

A demurrer to the bill was filed by the City of Detroit, and an answer thereto was filed by the Detroit Railway. The testimony was taken under the issue made by the Detroit Railway, and the cause came on to be heard upon the pleadings and proofs in the Wayne Circuit Court, in Chancery, which resulted in a decree of that Court dismissing the bill of plaintiff in error. An appeal was taken to the Supreme Court of the State where the case was heard. That Court affirmed the decision of the lower Court, and the case was then removed to this Court by writ of error.

The case grows out of a grant made by the City of Detroit to the Detroit Railway, of the right to construct, maintain and operate street railways in certain streets and avenues in Detroit, which plaintiff in error claims was in violation of the provision in its grant from the City of Detroit which was prior in point of time to that of the defendant in error, and by the terms of which it was granted the right to construct, maintain and operate street railways in certain named streets in the City of Detroit, and such other streets and avenues in said city as may from time to time be fixed and determined by vote of the Common Council of said City of Detroit, and the further claim by the plaintiff in error that the grant to the defendant in error impaired the obligation of the contract then existing between the plaintiff in error and the City of Detroit by which it claimed was granted the right to construct all new and additional street railway routes in said city.

The provision which plaintiff in error claims was violated and impaired by the subsequent grant to the defendant in error is found in section two of the ordinance (Rec., p. 12), which, after granting the right on certain streets therein named, proceeds, "and through such other streets and avenues in said city as may from time to time be fixed and determined by vote of the Common Council of the City of Detroit, and assented to in writing by said corporation organized as provided in Sec. 1 of this ordinance: And provided the corporation does not assent in writing within thirty days after the passage of the resolution of said Council ordering the formation of new routes, then the Common Council may give the privilege to any other company to build such route, and such other company shall have the right to cross any track of rails already laid at their own cost and expense."

STATEMENT OF THE CASE.

The plaintiff in error is the successor of the Detroit City Railway, the original grantee and possessor of the rights claimed to be violated and impaired.

"The Detroit City Railway" was organized May 9th, 1863, for thirty years, under the train or tram railway act of 1855, as amended. 1 How. Stat., p. 900.

Sections 33 and 34 of that act are as follows:

"Sec. 33. It shall be competent for parties to organize companies under this act to construct and operate railways in and through the streets of any town or city in this State."

"Sec. 34. All companies or corporations formed for such purposes shall have the exclusive right to use and operate any street railways constructed, owned or held by them; provided, that no such company or corporation shall be authorized to construct a railway under this act through the streets of any town or city without the consent of the municipal authorities of such town or city and under such regulations and upon such terms and conditions as said authorities may from time to time prescribe: Provided, further, that after such consent shall have been given and accepted by the company or corporation to which the same is granted, such authorities shall make no regulations or conditions whereby the rights or franchises so granted shall be destroyed or unreasonably impaired, or such company or corporation be deprived of the right of constructing, maintaining and operating such railway in the street in such consent or grant named, pursuant to the terms thereof."

The Detroit City Railway was organized for the purpose of accepting, and it did accept, an ordinance of the Common Council of the City of Detroit, approved November 24th, 1862, and which ordinance, among other terms and conditions, contains the following:

"Sec. 2. The said grantees are, by the provisions of this ordinance, exclusively authorized to construct and operate railways as herein provided, on and through Jefferson, Michigan and Woodward avenues, Witherell, Gratiot, Grand River and Brush or Beaubien streets; and from Jefferson avenue through Brush or Beaubien streets to Atwater street; and from Jefferson avenue, at its intersection with Woodbridge street, to Third street; up Third street to Fort street and through Fort street to the western limits of the city; and through such other streets and avenues in said city as may from time to time be fixed and determined by vote of the Common Council of the said City of Detroit, and assented to, in writing, by said corporation, organized as provided in section first of this ordinance. And provided, The corporation does not assent, in writing, within thirty days after the passage of said resolution of the Council, ordering the formation of new routes, then the Common Council may give the privilege to any other company to build such route, and such other company shall have the right to cross any track of rails already laid, at their own cost and expense: Provided, always, that the railways on Grand River street, Gratiot street and Michigan avenue shall each run into and connect with the Woodward avenue railways, in such direction that said railways shall be continued down to, and form, each of them, one continuous route to Jefferson avenue; Provided, always, that said railroad down Gratiot street may be continued to Woodward avenue, through State street, or through Randolph street, and Monroe avenue and the Campus Martius, as the

grantees, or their assigns, under this ordinance, may elect."

The circumstances under which the parties agreed upon the terms and conditions contained in section 2 are important.

The following averment of the bill in this cause is not denied, and is in part admitted by the answer of the Detroit Railway (Record, pp. 4, 50).

"6. At the time the ordinance of November 24, 1862, was passed and accepted, the population of the City of Detroit was only about 50,000 people, and there were no street railways in the city. The provisions of said section 2 were inserted in the ordinance for the purpose of inducing the promoters and stockholders of the Detroit City Railway to invest sufficient capital to establish a street railway system in the City of Detroit."

The proofs disclose the following facts:

In 1862 (Rec., 122), the Common Council passed an ordinance, approved May 24th, 1862, granting to H. K. Sanger et al., when organized into a corporation under the tram railway law, the right to build, and operate street railways through certain streets and avenues of the city. Section 2 is as follows (Rec., 123):

"Sec. 2. The said grantees are, by the provisions of this ordinance, authorized to construct and operate railways as herein provided through Woodward, Jefferson and Michigan avenues and through Gratiot and Grand River streets, and from Jefferson avenue through Woodbridge street to Seventh street, up Seventh street to Fort street, and through Fort street to the western limits of the city, and through such other streets and avenues in said city as may from time to time be fixed and determined by vote of the Common Council of said City of Detroit, and assented to in writing by said corporation organized as provided in section 1 of this ordinance. And provided,

The corporation does not assent in writing within thirty days after the passage of such resolution of the Council, ordering the formation of new routes, then the Common Council may give the privilege to any other company to build such route, and such other company shall have the right to cross any track of rails already laid, at their own cost and expense; Provided, always, that the railways on Grand River street, Gratiot street and Michigan avenue shall each run into and connect with the Woodward avenue railways in such direction that said railways shall be continued down to and form each of them one continuous route to Jefferson avenue: Provided, always, that said railways down Gratiot street may be continued to Woodward avenue through State street, or through Randolph street and Monroe avenue and the Campus Martius, as the grantees or their assigns under this ordinance may elect."

It will be noticed that in this ordinance, the word "exclusive" was not used, but it does agree with the language of the ordinance of November 24th, 1862, with reference to certain specified streets named therein, and also in granting the right to build "through" such other streets and avenues in said city, as may from time to time be fixed and determined by vote of the Common Council of the City of Detroit, and assented to in writing by said corporation, and further in requiring the assent to be within thirty days. The section is exactly the same in substance as section 2 of the November ordinance, except that it does not use the word "exclusive." This ordinance was never accepted by the grantees, so that we find (Rec., 127), in August of that year the City Controller was directed by the Common Council to advertise for thirty days for proposals for building the street railways specified in the May ordinance, and he was directed to use the May ordinance with the names of the grantees stricken out,

and the time for building the roads extended eight months, as a specification on which proposals for building the roads would be received. The Controller inserted the advertisements directed by the Council, calling for sealed proposals for constructing the street railways specified, and on the 30th of September following (Rec., 127), reported to the Council that he had received only one proposal, and that from C. S. Bushnell, which was accompanied by a letter from E. N. Wilcox, Esq., attorney for Bushnell. Subsequently and on November 24th, 1862, the ordinance containing the section in question in this case was passed, granting to Bushnell and Wilcox, and their associates, consent, permission and authority to build street railways in the various streets named, and containing the exclusive prior option or right contained in section 2.

We have the right to presume that the changes made in the terms of the ordinance from what they were in the May ordinance were the result of deliberate negotiations between the parties, with a distinct understanding of their full import, and when we find the ordinance is changed in respect to the very matter involved in this suit, we very readily conclude that the changes made were the result of negotiations brought about by the public call for proposals, and with the understanding and good faith of both parties that the city had full power and authority to make the contract in the terms and with the conditions named in section 2, and that the favorable terms and conditions made by the amendments and changes were the controlling considerations which induced the grantees to accept the ordinance of November 24th, 1862, and to refuse to accept the ordinance of May 24, 1862. Before the ordinance was accepted it was twice amended. First by an ordinance approved December 27th, 1862 (Rec., 200),

and next by an ordinance approved January 12th, 1863 (Rec., 201).

That it was a work of considerable difficulty to bring about the investment of capital in the construction of street railways in this city, at the time the city called for proposals, will be seen from the testimony of Fred Carlisle (Rec., p. 103), from which it appears that he took an active part in endeavoring to interest parties in it, and it was only after considerable difficulty, and evidently after considerable modifications of the terms of the ordinance, that capital could be induced to engage in the enterprise.

THE FORT STREET AND GRAND RIVER LINES.

Among the lines specifically named and granted in section 2 of the ordinance of November 24, 1862, were Grand River street and Fort street. The Fort street line was to be completed within six months from March 31, 1863, and the Grand River street line to the easterly line of the Woodbridge Farm was to be completed within two years from the same date, and the balance thereof as the public necessity might require. See section 6 of the ordinance (Rec., 13).

By an ordinance approved August 19, 1863, the time to complete the Fort street line was extended to October 1, 1864. This extension was coupled with this provision: "And a failure to complete the same by that time shall be regarded as a forfeiture of the route or routes not so completed" (Rec., 205, and 17).

The Fort street line was modified by an ordinance approved January 4, 1864 (Rec., 206-207, and 17-18).

The Detroit City Railway did not build the Fort street line and thereby forfeited its right to do so. The line was subsequently built by the Fort Street & Elmwood Avenue Railway, to whom a grant was made by an ordinance

passed over the Mayor's veto January 31, 1865 (Rec., 380-384).

It appears by the testimony of Mr. Emory Wendell that the Detroit City Railway consented to the construction of the Fort street line by another company (Rec., 99, 100, 102, 103).

The Detroit City Railway also forfeited its right to build the Grand River street line by not building it within the prescribed time. See section 18 of the ordinance of November 24, 1862 (Rec., 15).

This forfeiture was passed upon by the City Counselor and City Attorney in 1865 and 1866 (Rec., 210, 213).

After advertising for proposals a grant was finally made May 1, 1868, by the Common Council to the Grand River Street Railway Company (Rec., 387-391).

This grant is made subject to the rights of the Detroit City Railway (Rec., 391, Sec. 21).

This line was subsequently acquired by the Detroit Citizens' Street Railway Company, and for that reason section 2 of the ordinance of May 1, 1868, should not be overlooked. It reads:

"Sec. 2. The said grantees are hereby, by the provisions of this ordinance, authorized to construct and operate railways, as herein provided, through Woodward avenue from Jefferson avenue, from said last named avenue to its intersection with Grand River avenue, and from thence on and through said Grand River street to the point of intersection with the railway tracks of the Michigan Southern and Detroit, Monroe and Toledo Railway tracks. And also on and through any other street or streets running between the western terminus above specified and Woodward avenue, from said Grand River street to the Detroit river, as the Common Council shall by resolution designate; Provided, that there shall not be

at any time more than two parallel street railway tracks on Woodward avenue."

It fully appears, therefore, from this record that the Fort street and Grand River avenue lines were both named in the original grant to the Detroit City Railway; that that company was given the first right or option to build these lines, and by neglect to build them forfeited its right so to do.

THE CONGRESS AND BAKER LINE.

The Common Council of Detroit made a grant to the Detroit and Grand Trunk Junction Street Railway June 13th, 1873, without making a first offer of the line to the Detroit City Railway (Rec., 404-407). But it appears from the testimony of Frederick Carlisle that the original purpose of the road was to make a city connection for the steam railway known as the Canada Southern. As that company went into bankruptcy within six months the street railway company was a financial failure. It was operated at a loss for four years, was then sold to a syndicate and passed to the Detroit City Railway (Rec., 105, 107). It subsequently became known as the Congress and Baker street line.

It is evident that the Detroit City Railway had no desire to build this line; it was prematurely projected, and was, in fact, built for steam railway purposes, and not for an addition to the street railway system.

THE CASS AVENUE LINE.

The Central Market, Cass avenue and Third street line was projected in 1876. Mr. Sidney D. Miller, president of the Detroit City Railway, insisted upon the exclusive option of that company in a communication to the Common Council (Rec., 110).

The communication was reported upon by the judiciary committee and the City Counselor, and the right of the Detroit City Railway was recognized (Rec., 128-129). The report was adopted by the Common Council (Rec., 129), but disregarded in passing the Cass avenue ordinance, which was in the form of an amendment of a prior ordinance which had not been accepted or acted upon (Rec., 130). The Mayor thereupon interposed his veto on the ground that the ordinance passed was in conflict with the rights of the Detroit City Railway as reported upon by the judiciary committee and the City Counselor, and the veto was not overruled by the Common Council (Rec., 130-132).

Resolutions were then introduced into the Common Council offering the line to the Detroit City Railway for thirty days, but they do not appear to have been adopted (Rec., 131-132).

This record does not disclose any further facts in regard to the building of the Cass avenue line, except that a grant was made to the Central Market, Cass Avenue and Third Street Railway Company, and which subsequently passed to the Detroit City Railway (Rec., 330). It is fair to presume that the Cass avenue line was built in the interest of the Detroit City Railway. This much is certain, at all events, that the Detroit City Railway insisted and relied on its first right or option and that there was no serious dispute between the city and the company in regard thereto.

CONSOLIDATION OF 1879.

The ordinance of November 14, 1879, extending the grant of the Detroit City Railway to November 14, 1909, subjected the Congress and Baker street line and the Cass avenue line to the ordinance of November 24, 1862, as amended and extended. See section 3 (Rec., 20).

Sec. 6 (Rec., 21) is as follows:

"This ordinance shall take immediate effect when written acceptances of the terms thereof are filed in the office of the City Clerk of Detroit by the Detroit City Railway Company, the Detroit & Grand Trunk Junction Street Railway Company and the Central Market, Cass Avenue & Third Street Railway Company, or their successors; and from that date all ordinances or parts of ordinances in conflict with the provisions hereof shall stand repealed; and all ordinances and parts of ordinances not in conflict herewith are hereby affirmed and continued in force."

Separate acceptances by each company and a joint acceptance by all three companies were duly filed (Rec., 248-249).

The effect of the ordinance of November 14, 1879, was to extend the operation of Sec. 2 of the ordinance of November 24, 1862, for thirty years, and to leave the Fort street road and the Grand River road as the only independent lines in the city. Both of these lines had been specifically granted to the Detroit City Railway in the ordinance of November 24, 1862, and both had been forfeited by that company, as we have already shown.

FROM 1879 TO 1894.

The parties acted upon and carried out Sec. 2 of the ordinance of November 24, 1862, from 1879 to 1894 without deviation or modification in any way. The method of transacting the business, in passing and accepting subsequent ordinances, will be understood by a reference to acceptances numbered from 5 to 16 (Rec., 250-265).

FROM 1862 TO 1894.

It appears from the record that not a single mile of street railway has ever been constructed in the City of Detroit, from 1862 down to the making of the grant to the defendant in error, the Detroit Railway, unless the route

had first been granted to the Detroit City Railway, and by the failure to accept or construct, that company had forfeited its right to the same, or a grant was made to another company with the consent of the Detroit City Railway. Such consent was given in the case of the two first electric lines, the Highland Park line, and the Dix avenue line. See testimony of Frank E. Snow and Strathearn Hendrie (Rec., 456, 458).

DETROIT RAILWAY ORDINANCE OF DECEMBER 4, 1894.

By an ordinance approved December 4th, 1894, the Common Council granted to the Detroit Railway the right to construct street railways upon a large number of streets in Detroit without giving the Detroit Citizens' Street Railway Company as the successor of the old Detroit City Railway the first right or option thereon (Rec., 34-45).

This ordinance was granted and accepted in the face of the solemn objections and protests of the Detroit Citizens' Street Railway Company. See allegations and notices in 8th, 9th and 10th paragraphs of bill (Rec., 5-8).

The Detroit Citizens' Street Railway Company was organized August 24th, 1891, for thirty years, under the general act for the incorporation of street railway companies, approved March 5th, 1867.

I How. Stat., p. 908.

Sections 13, 14, 15, 18, 20 and 29 of that act are as follows:

"Sec. 13. Any street railway corporation organized under the provisions of this act may, with the consent of the corporate authorities of any city or village, given in and by an ordinance or ordinances duly enacted for that purpose, and under such rules, regulations and conditions as in and by such ordinance or ordinances shall be pre-

scribed, construct, use, maintain and own a street railway for the transportation of passengers in and upon the lines of such streets and ways, in said city or village, as shall be designated and granted from time to time for that purpose, in the ordinance or ordinances granting such consent; but no such railway company shall construct any railway in the streets of any city or village until the company shall have accepted in writing the terms and conditions upon which they are permitted to use said streets; and any such company may extend, construct, use and maintain their road in and along the streets or highways of any township adjacent to said city or village upon such terms and conditions as may be agreed upon by the company and the township board of the township, which agreement and the acceptance by the company of the terms thereof shall be recorded by the township clerk in the records of his township."

"Sec. 14. After any city, village or township shall have consented, as in this act provided, to the construction and maintenance of any street railways therein, or granted any rights and privileges to any such company, and such consent and grant have been accepted by the company, such township, city or village shall not revoke such consent, nor deprive the company of the rights and privileges so conferred."

"Sec. 15. Any street railway company may also purchase and acquire, either at public or private sale, whether judicial or otherwise, or may hire any street railway in any city, village or township owned by any other corporation or company, together with all the real and personal estate belonging thereto, and the rights, privileges and franchises thereof, and may use, maintain and complete such road, and may use and enjoy the rights, privileges and franchises of such company, the same, and upon the same terms as the company whose

road and franchises were so acquired might have done. Every street railway company may also purchase, hold, own or take upon lease such real estate, barns, stables, buildings, fixtures and property as may be necessary for the use and business of their road; and the whole or any part thereof, together with their railway, fixtures, property and appurtenances, rights, privileges and franchises, may sell, lease, dispose of, pledge or mortgage whenever the corporation shall deem it expedient so to do."

"Sec. 18. Every street railway company is hereby required to lay the track of their road or railway in such way or mode and with such kind of rail, and to keep their railway and that part of the street and pavement within and adjacent to the track of such road or railway, in such condition and state of repair as shall be prescribed and provided in the consent, grant or agreement of the municipal authorities permitting the construction and location of such road or railway."

"Sec. 20. The rates of toll or fare which any street railway company may charge for the transportation of persons or passengers over their road shall be established by agreement between such company and the corporate authorities of the city or village where the road is located, and shall not be increased without consent of such authorities."

"Sec. 29. All companies and corporations heretofore organized in this State for the purpose of building and operating street railways under the statutes then in force shall have the same powers, rights, protection and privileges, and shall be subject to all the liabilities as are hereby provided for companies and corporations organized under the provisions of this act."

Under this legislation the Detroit Citizens' Street Railway Company has acquired by purchase all of the street railway lines and all the contract rights under the ordi-

nance of November 24th, 1862, as amended and extended of the Detroit City Railway.

The bill in this case is filed by the Detroit Citizens' Street Railway Company to enjoin the City of Detroit and the Detroit Railway, as the parties to the grant of December 4th, 1894, from carrying out and executing the same and from constructing and operating the street railways proposed to be constructed thereunder.

The only question in the case is whether the provisions of said Section 2, giving to the Detroit City Railway the first right to construct new routes and extensions, are valid and binding and, as such, enforceable.

ASSIGNMENT OF ERRORS.

Plaintiff in error makes the following assignment of errors:

1. The said Supreme Court erred in holding and finding that the City of Detroit had not the power to make the grant and contract set up in complainant's bill of complaint and upon which it based a claim for relief against the defendants and the obligation of which it claimed was impaired by the grant to the defendant the Detroit Railway, within the meaning of the provision of the Constitution of the United States prohibiting any State from passing any law impairing the obligation of any contract.

2. The said Court erred in holding and deciding that the obligation of the grant and contract set up by the complainant in its bill of complaint were not impaired by the subsequent grant to the defendant the Detroit Railway by the defendant the City of Detroit, and in denying to the complainant the rights and protection claimed and asked for by it in its said bill of complaint under the provision of the Constitution of the United States pro-

hibiting any State from passing any law impairing the obligation of a contract.

3. The said Court erred in denying to it the rights claimed by it in its bill of complaint under the fourteenth amendment of the Constitution of the United States and in denying any relief to the complainant on that ground.

4. The said Court erred in holding and deciding that complainant was not entitled to the remedy and relief prayed for in its bill of complaint and in affirming the decree of the Circuit Court of the County of Wayne, in Chancery, dismissing complainant's bill of complaint.

5. The said Supreme Court erred in not ordering and directing a reversal of the decree of the Circuit Court for the County of Wayne, in Chancery, and directing the entry of a decree in favor of complainant as prayed for in its bill of complaint.

The gist of the foregoing assignments may be stated to be that the grant to the plaintiff in error was a contract within the protection of the provision of the Constitution of the United States prohibiting any State from passing any law impairing the obligation of any contract. That the subsequent grant by the City to the defendant in error the Detroit Railway was a violation and impairment of the obligation of that contract. That the contract in question was valid and binding and conferred property rights upon the plaintiff in error, and that the action of the defendants in error operated to deprive the plaintiff in error of its property without due process of law, and that the Supreme Court of the State of Michigan erred in not accepting the views of the plaintiff in error in that respect, and in dismissing the bill of complaint.

ARGUMENT.

I.

In the absence of constitutional provisions to the contrary, a State Legislature has power to confer on gas, water, street railway and similar corporations exclusive rights, privileges and franchises in the public streets and highways occupied or used by them.

This doctrine has been so thoroughly established by this Court that it is not open to controversy.

New Orleans Gas Light Co. vs. Louisiana, etc., Co., 115 U. S., 650.
New Orleans Water Works Co. vs. Rivers, Id., 674.
Louisville Gas Co. vs. Citizens' Gas Light Co., Id., 683.

In the first case cited the Louisiana Legislature had granted "the sole and exclusive privilege of making and supplying gas lights in the City of New Orleans by means of pipes or conduits laid in the streets to such persons or bodies corporate as might voluntarily choose to contract for it" for fifty years from April 1st, 1875. This sole and exclusive privilege was held by the New Orleans Gas Light Company, which was a consolidation of certain prior corporations.

In 1881 a corporation was organized under a general law providing for the formation of corporations for the construction and maintenance of works for supplying cities or towns with gas.

The Common Council of New Orleans passed an ordinance authorizing the new company to lay gas pipes in the streets of the city.

The old company filed a bill to enjoin the new company from making any such use of the streets, and the Supreme Court of the United States granted the relief prayed.

The opinion of the Court, as prepared by Mr. Justice Harlan, contains an exhaustive examination of the prior decisions of the Court, and sums the matter up as follows:

"If the State can, by contract, restrict the exercise of her power to construct and maintain highways, bridges and ferries by granting to a particular corporation the exclusive right to construct and operate a railroad within certain lines and between given points, or to maintain a bridge or operate a ferry over one of her navigable streams within designated limits; if she may restrict the exercise of the power of taxation by granting exemption from taxation to particular individuals and corporations, it is difficult to perceive upon what ground we can deny her authority when not forbidden by her own organic law—in consideration of money to be expended and important services to be rendered for the promotion of the public comfort, the public health or the public safety, to grant a franchise to be exercised exclusively by those who thus do for the public what the State might undertake to perform either herself or by subordinate municipal agencies."

In conclusion the learned justice called attention to the fact that the power to condemn private property to the public use was open to the State if it became advisable to terminate the grant before it expired.

He then said:

"In that way the plighted faith of the public will be kept with those who have made large investments upon the assurance of the State that the contract with them will be performed."

In the second case cited the New Orleans Water Works Company was given for fifty years from 1877 "the ex-

clusive privilege of supplying the City of New Orleans and its inhabitants with water from the Mississippi or any other stream or river by mains or conduits, and for erecting and constructing any necessary works or engines or machines for that purpose."

In 1882 the Common Council of New Orleans passed an ordinance authorizing Robert E. Rivers, or the lessee of the St. Charles Hotel, to lay a water pipe through the streets from the Mississippi River to the hotel to supply it with water.

The water company filed a bill against Rivers to enjoin him from laying a water pipe in the streets. The Supreme Court of the United States held that the company was entitled to the relief prayed. Referring to the situation of the defendant, the Court said:

"In common with all corporations and all other citizens of New Orleans, he must abide by the contract which the State made with the plaintiff, for such is the mandate of the Constitution of the United States."

In the third case cited the Legislature of Kentucky conferred on the Louisville Gas Company for twenty years "the exclusive privilege of erecting and establishing gas works in the City of Louisville" and "of vending coal gas lights and supplying the city and citizens with gas by means of public works."

Subsequently another gas company was incorporated, and with the consent of the city it was authorized to lay gas pipes in the streets. The City Council gave its consent. Held, that the contract with the old company was impaired by the charter of the new company, and that the old company was protected by the Constitution of the United States.

Before going any further in this discussion it will be advisable to have a clear understanding of the nature of the power exercised by a State Legislature in making a

grant to a quasi public corporation of the right to use the public highway and streets for the conduct of its corporate business.

A public street or highway is an easement, the title to which is vested in the public; that is, the whole or general public have a right to use a street or highway for travel and passage and purposes of a similar character. In States where there are no constitutional requirements to the contrary, the general public is represented by the Legislature, and that body has control and full supervision over the public interests in the highways of the State, and can modify, discontinue or surrender the public rights in whole or in part. The power of the Legislature in this respect is so great that it is equivalent to title in the State to the easement, the same being held by the State in trust for the public benefit; but the State has no title to the strips of land used as highways that is equivalent to private proprietorship, such as the State has in the sites on which the State Capitol and other State buildings are erected.

In the Lake Front cases of Illinois Central R. R. vs. People of Illinois, 146 U. S., 387, this Court had occasion to state the difference between a title held by the State as a proprietor and a title held in trust for public purposes.

The opinion of the Court by Mr. Justice Field contains the following:

"That the State holds the title to the lands under the navigable waters of Lake Michigan, within its limits, in the same manner that the State holds title to soils under tide water, by the common law we have already shown, and that title necessarily carries with it control over the waters above them whenever the lands are subjected to use. But it is a title different in character from that which the State holds in lands intended for sale. It is

different from the title which the United States holds in public lands which are open to pre-emption and sale. It is a title held in trust for the people of the State, that they may enjoy the navigation of the waters, carry on commerce over them and have liberty of fishing therein freed from obstruction or interference of private parties."

An extract from the opinion of Mr. Justice Bradley in Stockton vs. Baltimore & New York R. R. Co., 32 Fed. Rep., 9, is approvingly quoted by Justice Field, and from which we quote the following:

"It is insisted that the property of the State, in lands under navigable waters, is private property, and comes strictly within the constitutional provision. It is significantly asked, can the United States take the State house at Trenton and the surrounding grounds belonging to the State and appropriate them to the purposes of a railroad depot or to any other use of the general government without compensation? We do not apprehend that the decision of the present case involves or requires a serious answer to this question. The cases are clearly not parallel. The character of the title or ownership by which the State holds the State house is quite different from that by which it holds the land under the navigable waters in and around its territory. The information rightly states that prior to the revolution the shore and lands under water of the navigable streams and waters of the province of New Jersey belonged to the king of Great Britain, as part of the jura regalia of the crown, and devolved to the State by right of conquest. The information does not state, however, what is equally true, that after the conquest the said lands were held by the State, as they were by the king, in trust for the public uses of navigation and fishery and the erection thereon of wharves, piers, lighthouses, beacons and other facilities of navigation and commerce. Being subject to this trust,

they are publici juris; in other words, they are held for the use of the people at large."

In People vs. Supervisors of Ingham Co., 20 Mich., 102, the case involved the validity of proceedings of the Board of Supervisors of Ingham County in discontinuing a part of the old State road running from Lansing to Marshall. The Legislature had passed an act legalizing the action and proceedings of the Board of Supervisors.

The Court, per Christiancy, J., said:

"The legislative power is everywhere recognized as the proper guardian of such public rights as the right to travel upon the highways, and having as the proper representative of the public full power over the whole subject of laying out, opening, altering and discontinuing highways. And this power they may, so far as they have not been restrained by the constitution, exercise directly without delegating it to any other tribunal.

"Our constitution has expressly taken from the Legislature the power to 'vacate or alter any road laid out by the Commissioners of Highways.' (Art. 4, Sec. 23.) But this is equivalent to an express affirmation of the power to vacate or alter a State road like that here in question, laid out by the Legislature itself. And there is a manifest propriety and consistency in placing the power to discontinue such roads in the same body which exercises the power to lay out."

It is here worthy of note that before the Constitution of 1850 was adopted the Legislature of Michigan had full control of our streets and highways, and the local consent to their occupation and use by plank road and other corporations was not constitutionally necessary.

Attorney General vs. Detroit & Erie R. R. Co., 2 Mich., 138.

Detroit & Howell P. R. Co. vs. Fisher, 4 Mich., 38.

In Plank Road Co. vs. Railway Co., 103 Mich., 585, where the grant was made before 1850, the Court, in an opinion by McGrath, C. J., said:

"By the terms of its charter, complainant was put into possession of said highway and was to retain such possession for the purpose of the construction and operation of its road. There is no doubt of the power of the Legislature in such case to make the privilege exclusive. (Wright vs. Nagle, 101 U. S., 791.)"

II.

The Michigan Constitution of 1850 takes the sovereign power of the State over all public streets and highways (except State roads laid out under the swamp land grants of the United States) from the State Legislature and distributes it among the townships, cities and villages of the State, to be separately exercised by them as their particular interests, necessities and welfare may require.

In many of the States constitutional provisions have been adopted prohibiting the Legislature from granting the right to construct and operate street railways without the consent of the local authorities; and in nearly all the States there are statutory provisions making the local assent necessary. These constitutional and statutory provisions are collated in Booth on Street Railways, Sec. 28, notes.

In Michigan we have no express constitutional provision referring to street railways, but we have other provisions relating to the general control of the highways, which accomplish the same result, not only as to street railway companies, but as to all other corporations which use the streets and highways.

As a result of the practical experience of the State in railroad building, the following sweeping and peremptory provision was inserted in the Constitution of 1850:

"The State shall not be a party to or interested in any work of internal improvement, nor engaged in carrying on any such work, except in the expenditure of grants to the State of land or other property."

Art. XIV., Sec. 9.

This left the streets and highways of the State to be laid out, constructed and improved by the local authorities; and certain officers for that purpose are provided for by the Constitution itself:

"There shall be elected annually on the first Monday of April in each organized township * * * one commissioner of highways * * * and one overseer of highways for each highway district."

Art. XI., Sec. 1.

Another section provides:

"The Legislature shall not * * * vacate or alter any road laid out by the Commissioners of Highways, or any street in any city or village, or in any recorded town plat."

Art. IV., Sec. 23.

There can be no question about the effect of these constitutional provisions in taking power from the Legislature and transferring it to the local governments.

In Hubbard vs. Township Board of Springwells, 25 Mich., 153, the Legislature had passed an act authorizing a Board of Commissioners, appointed by the governor, to improve Fort street west, in the Township of Springwells. These commissioners were authorized to collect tolls, and

the township was required to issue bonds and submit to taxation for the purposes of the improvement.

The Court, in an opinion by Campbell, J., held the act unconstitutional, and as it is a complete exposition of the position we take on this subject, we quote the following, beginning on p. 155:

"The work in question is one specifically ordered to be made by a law of the State, and the moneys are to be raised and expended by State agents, the expenses being charged, in part, upon a township, and in part upon a smaller district, but leaving these localities no option of receiving or rejecting the burden.

"By Article XIV., Section 9, of the State Constitution, it is declared: 'The State shall not be a party to or interested in any work of internal improvement, nor engaged in carrying on any such work, except in the expenditure of grants to the State of lands or other property.'

"That a macadamized road is a 'work of internal improvement' is manifest. The shortness of the road does not change its character. The restriction is not against great works, but against all works of that kind, and the case comes within the language and intent of the prohibition. And we can only repeat what was said in Ryerson vs. Utley, 16 Mich., R., 269, that 'The constitution does not permit the State either to contract a debt for a public improvement or to expend in its construction anything but the grants which it has received for the purpose; and any legislation which attempts any other expenditure must be directly within the constitutional inhibition, and therefore, void' (p. 275). The question whether the work is carried on by the State in no way depends on the sources from which the money is drawn to pay for it. It is a State work if directed, planned and executed by State agency, and while the fact that the money is charged on

a certain locality may make the proceeding objectionable on independent grounds, it does not alter its character.

"The ground set up in the replication also renders it necessary to consider the action of the commission in its bearing upon the local authorities, and to examine how far it can be considered as binding upon them by acquiescence or adoption.

"The street, being a public highway, was by law put under the charge of the local authorities. The constitution (Art. XI., Sec. 1) requires an election every year of a township Commissioner of Highways and of an overseer of highways for every highway district. Their powers were subject to legislative modification, but no legislation could abolish the offices or take away all their functions. The highways in each district must be, to some extent, at least, subject to an overseer elected by the people. As we held in the case of the Detroit Board of Public Works (24 Mich., 44), the regulation of the township affairs, legally concerning none but the people of the town, cannot be lawfully vested in any officers imposed upon the township from without. These commissioners, not appointed by, or responsible to, the township or its people, are empowered to assume exclusive charge of a town highway, turn it into a toll road and raise money and impose taxes in the township to complete and repair the work. From first to last, the town and all its elected officers are powerless and subject to the control of this foreign body; and the people have no voice in the management of one of their own public ways, which is converted into a perpetual turnpike, and put on the same footing with private turnpikes, except that its trustees are appointed by the State and paid by a tax imposed upon the town. The overseer of this highway district is excluded from all his functions, and so are all others who should have any voice in the matter. The result is that a purely

local work, public in its character, is taken charge of and conducted at local expense, and paid for by local bonds and taxes, without giving the local authorities any function to perform, except that of yielding implicit obedience to the orders and requisitions of a commission, in whose appointment and government the town and its people have had no part whatever.

"This is a very clear usurpation, and, so far as it goes, an absolute destruction of the local privileges. There is no principle which can justify such an interference, which would not equally justify the assumption by the State of the immediate control by its agencies of every highway in the commonwealth, and the imposition of local taxes for local purposes to be levied and expended by persons neither residents in, nor in any way connected with, or responsible to, the towns in which they levy their charges."

Davies vs. Board of Supervisors of Saginaw Co., 89 Mich., 295, is a case which concerned the validity of an act of the Legislature, by which it was proposed to take certain highways in the County of Saginaw out of the control of the townships, cities and villages and put them in charge of a Board of County Road Commissioners created by the act.

The Court, in an opinion by Mr. Justice McGrath, held the act unconstitutional upon four different grounds, the first and second of which are shown by the following extracts from the opinion:

"This act cannot be sustained.

"1. It seeks to divest certain local officers, recognized as such and provided for by the constitution, of the functions of their offices, and to confer those functions upon a board appointed by a power removed from that locality and not responsible to local authority.

"The functions of township officers who are continued by constitutional enactment are as clearly within the contemplation and protection of the constitution as are the officers themselves, and the Legislature has no more power to deprive those officers of their authority and confer that authority upon officers not of local selection than it has to abolish the offices. It is just as essential to local self-government that the functions of elective officers be preserved to such officers as that the right of election be protected; indeed, it is the local management of local concerns, by and through the medium of officers of their own selection, that is sought to be protected. Strip the officers of a municipality of their own functions, and you rob the municipality of its vitality." * * *

"2. The act undertakes to convert certain highways already laid out—presumably by township authority—into State roads, and to give to the Board of Supervisors authority to convert other roads into State roads.

"State roads are such only as have been laid out by State authority." * * *

"Section 23, of Article 4, of the Constitution expressly prohibits the discontinuance by the Legislature of highways laid out by township authorities. The right of the Legislature to vacate State or territorial roads is unquestioned. If highways may be converted into State roads by legislative declaration, and State roads may be discontinued at the will of the same body, then the constitutional provision may be easily avoided."

The Constitution of 1850 also contains the following provision:

"The Boards of Supervisors of each organized county may provide for laying out highways, constructing bridges and organizing townships under such restrictions and limitations as shall be prescribed by law."

The statutes have always confined this power of the Boards of Supervisors to State and territorial roads.

1 How. Stat., Secs. 497-500.

In People vs. Highway Commissioners of Nankin, 15 Mich., 347, the question arose whether the power of the supervisors affected that of Township Highway Commissioners.

Cooley, J., speaking for the Court, said:

"This section has never been construed by the Legislature as taking from the township authorities the control over roads which they before possessed, and all the statutes which have since been passed on the subject have provided for the continued exercise of that control. A careful examination of the provision will show that it is not one which executes itself, but that it contemplates action by the Legislature establishing restrictions and limitations before it becomes operative. Even then it is not in its terms exclusive, and there is nothing which would preclude the Legislature from conferring power over this subject on the Township Highway Commissioners even if they should also provide for the exercise of similar powers by the Board of Supervisors in specified cases, with suitable provisions to prevent conflict."

Whatever the Legislature may be able to do in that respect, this much is certain: It cannot exercise any power itself. The power in question must be exercised by either the Boards of Supervisors or by the township authorities, both of which are local bodies; and it is wholly immaterial which has been or may be given precedence over the other.

III.

The provisions of the Michigan Constitution of 1850, prohibiting the organization of corporations except under general laws, and limiting the life of corporations, with certain exceptions, to thirty years, also lead irresistibly to the conclusion that the power of the townships, villages and cities of the State to control the public streets and highways within their limits is an original power vested in them by the Constitution, and not a power delegated to them by statute.

The constitutional provisions are as follows:

"Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes. All laws passed pursuant to this section may be amended, altered or repealed."

"No corporation, except for municipal purposes, or for the construction of railroads, plank roads or canals, shall be created for a longer time than thirty years."

Art. XV., Secs. 1 and 10.

It requires but little reflection to see that inasmuch as the Legislature alone can pass a general law, it cannot delegate to municipal corporations the power to create corporations or to grant corporate franchises.

Neither can the Legislature grant the use of particular streets to a corporation, or to a class of corporations.

Nor can the Legislature authorize municipal corporations to do, in its behalf and as its agents, what it cannot do itself.

And, therefore, if these constitutional provisions apply to municipal corporations as restrictions upon their authority, street railway and similar grants for the use of particular streets cannot be made at all, because they are not capable of being made by a general law.

The Constitution of California, like that of Michigan, provides that "corporations may be formed under general laws, but shall not be created by special act except for municipal purposes."

In San Francisco vs. Spring Valley Water Works, 48 Cal., 493, it appeared that the Legislature passed a general law under which water companies could be formed or organized. It then passed an act granting to "George H. Ensign and his associates and their assigns," the right to use the streets of San Francisco for the purpose of laying water pipes therein, but this act was not to take effect unless Ensign and his associates, within sixty days, "duly organized themselves in conformity with existing laws regulating corporations now in force in this State."

Ensign and his associates did organize themselves into a corporation under the name of the Spring Valley Water Works.

The Court, in an opinion by Crockett, J., held the Ensign act unconstitutional.

At p. 513 the Court says:

"But on the other, and the true construction of this constitutional provision, all private corporations must derive their powers from general laws, and not from special statutes. The general laws under which they were formed, and such others as shall afterwards be enacted, must alone define their rights and powers. On this theory all private corporations, formed for similar purposes, will stand upon the same footing, enjoy the same rights, and be subject to the same burdens, which cannot be increased or diminished except by general laws

applicable to all. In harmony with this theory, and accepting this as the true construction of the Constitution, the Legislature, at its first session, enacted general laws under which private corporations might be formed, and defining minutely their powers and duties. These laws have been modified from time to time, but have never omitted to prescribe the powers to be exercised and the duties to be performed by the corporation. Nothing short of some imperative rule of constitutional construction would justify us in holding, at this late day, that, though corporations must be 'formed' under general laws, it is nevertheless competent for the Legislature, by special grant, to confer upon a corporation once organized, any powers, however extraordinary. We think, on the contrary, that no corporate rights or powers can be conferred by a special grant, but must all be derived under general laws."

A motion for a rehearing was made, and another opinion was filed. At p. 529 is the following:

"But the State has no proprietary interest in the streets of a city, dedicated to public use. In its capacity as a sovereign, it may regulate the use, or abolish it altogether. (Polock vs. San Francisco Orphan Asylum, ante p. 490.) But, as a general rule, the fee is in the owners of the adjoining lands on each side, to the center of the street, and the State can only regulate and control the easement which the public has over the land. When the State grants to a private corporation an easement over the streets, not common to the public at large, it acts in its sovereign capacity and grants a franchise, which enters into and forms an essential element in the corporate powers of the corporation; which becomes entitled to the right not because the State has parted with any proprietary interest in the land, but because in its sovereign capacity, having the control of public highways, it has

granted to the corporation a franchise, entitling it to an easement over the streets not common to the general public. This is purely a grant of corporate power, and nothing more or less, and, as we have already seen, such rights cannot be conferred by special act."

Followed:

Waterloo Turnpike Co. vs. Cole, 51 Cal., 381.

The doctrine of the foregoing cases was subsequently applied by the Supreme Court of California to a street railway grant. The Legislature passed a general law authorizing the local authorities in all parts of the State "to grant to any person or corporation the right to lay down and maintain for a term not exceeding twenty-five years, an iron railway track or tracks, upon any streets or avenues or public highways in said cities or towns, and to run cars thereon," etc.

After this law was in force the Legislature passed an act authorizing the Omnibus Railroad Company, and North Beach and Mission Railroad Company, to lay street railways on certain designated portions of an avenue in San Francisco, and the local authorities made a conflicting grant to other parties.

In Omnibus Railway Company vs. Baldwin, 57 Cal., 160, the question presented was whether the special grant so made by the Legislature was constitutional.

The Court held the special act in conflict with the provision that corporations shall only be organized under general laws.

In Chicago City Railway Co. vs. The People, 73 Ill., 541, it appeared that the Illinois Legislature had incorporated a street railway company by special act, and the Common Council of the City of Chicago granted to it the use of a public street on condition that it should build and complete a railroad thereon within fifteen months.

The company did not comply with the conditions, but only built part of the railroad within the fifteen months.

A new constitution was then adopted, providing for the organization of all corporations under general laws, and prohibiting the State by local or special laws from "granting to any corporation, association or individual any special or exclusve privilege, immunity, or franchise whatever," and from "granting to any corporation, association or individual the right to lay down railroad tracks, or amending existing charters for such purpose."

After the adoption of these constitutional provisions the Common Council of the City of Chicago passed an ordinance extending for two years the time in which the company was required to complete the railroad.

Counsel insisted that this ordinance was a grant of special privileges or franchises, and that it was void as in conflict with the Constitution.

In disposing of this contention, the Court, among other things, said:

"Article IV., Section 22, of the Constitution of 1870, cited, is a limitation upon the power of the general assembly to grant any corporation, association or individual the right to lay down railroad tracks, or amend existing charters for that purpose; but by no construction can it be said to be a limitation upon a municipal corporation to designate certain streets and fix the conditions upon which a railway company, organized under a special charter, previously granted, or under a general law since the adoption of the Constitution, might lay its track. It is a misconception of the law to suppose the railway company derives its power to construct a railroad from any ordinance of the city. All of its authority is from the State, and is conferred by its charter. The city has delegated to it the power to say in what manner and upon what conditions the company may exercise the franchises

conferred by the State, but nothing more. The authority of the city in this regard is not affected by the provisions of the Constitution which inhibit the granting by the general assembly of any special or exclusive privilege, immunity or franchise."

The Constitution of Ohio provides that "the general assembly shall pass no special act conferring corporate power."

In Sims vs. Street Railroad Co., 37 Ohio St., 556, 570, it was argued that " if the Legislature cannot by special act confer corporate powers, it cannot vest in city councils the power by ordinance to do the same thing."

But the Court replied:

"The vice of this argument is the assumption that an ordinance granting permission for such an extension confers corporate powers. It only permits the exercise of such powers as are conferred by statute. If such an ordinance confers corporate powers, then also does a like ordinance under sections 1 and 2 of the act of 1866, which provides that no street railroad shall be constructed in any street without permission first being granted."

"Neither statute authorizes the city council to confer corporate power. They vest in the city the right to grant or refuse to street railroad corporations permission to construct or extend their tracks under the corporate power acquired by their certificate of incorporation."

These cases make it perfectly clear that street railway grants, as made by the local authorities in this State, cannot be considered as grants of corporate powers or franchises so as to be subject to the restrictions imposed by the Constitution on the Legislature, for if subject to these restrictions, they are a legal impossibility.

When the local authorities act as the agents of the Legislature of the State, they are necessarily bound by

the limitations imposed by the Constitution of the State on the Legislature.

This is strongly illustrated by a case in Alabama.

Under the Alabama Constitution of 1875 the Legislature retains its sovereign control of public highways, but it is made subject to the following limitations:

"That no ex post facto law, nor any law impairing the obligation of contracts, or making any irrevocable grants of special privileges or immunities shall be passed by the general assembly."

It has been held that this provision prevents the general assembly from authorizing a municipal corporation to make irrevocable street railway grants.

Birmingham, etc., Ry. Co. vs. Birmingham St. Ry. Co., 79 Ala., 465.

At p. 475 the Court says:

"The exclusive right of the appellee to the privilege claimed, in our opinion, cannot be maintained. The general assembly would itself have no power under the Constitution to make such a grant. A fortiori, a mere municipality would have no such power."

IV.

It is an incontrovertible proposition, therefore, that in Michigan the local authorities, in making street railway grants and agreeing upon the terms and conditions thereof, exercise an original power vested in them by the Constitution of the State, and that they do not in any sense act as the agents of the State Legislature in virtue of a mere delegation of authority; and all decisions, State

or Federal, proceeding upon a contrary theory are either inapplicable or erroneous.

When street railways were first proposed in the City of New York, there was no law in the State of New York for the incorporation of street railway companies, and if they could be incorporated at all it must have been under the general law for the incorporation of steam railways.

At that time and for many years afterwards, the Legislature of that State had supreme control of all public highways, and was the trustee of the public rights therein. The Legislature had never authorized the Common Council of the City of New York to make street railway grants; nor had it authorized the Common Council to confer the franchise to operate street railways and collect tolls or fares.

Under such circumstances, the Common Council of the City of New York granted to Jacob Sharp and certain other persons, and those who might from time to time be associated with them, authority and permission to construct and operate a street railway on Broadway, and to collect fares from persons riding thereon. The resolution or ordinance of the Common Council provided that Sharp and his associates should organize themselves into a joint stock association, and in that way maintain succession, or that they incorporate themselves under the general railroad act.

The joint stock association contemplated was the common law copartnership known by that name.

The validity of this action of the Common Council was passed upon by the New York Court of Appeals.

Davis vs. New York, 14 N. Y., 508.

Five of the seven judges held the resolution of the Common Council void.

Denio, Ch. J., held (1) that the proposed railway was not within the purposes of a public highway, but inconsistent with, and destructive of, the public right of passage; and (2) that even if the railroad would be wholly unobjectionable as an obstruction in, or interference with, the street, and would not impair in the slightest degree the adaptation of that thoroughfare for all the purposes for which it could ever have been used, yet the right of making the road and collecting fares and tolls thereon was a franchise which could only be granted by the State, and could not be granted by the City of New York unless the power was in terms, that is, expressly conferred by the city charter.

Comstock, J., in a separate opinion, held that the City of New York had a right, in the exercise of its authority over the streets, to provide for the laying of iron rails along Broadway for the passage of a particular kind of carriage drawn by horses, but he was of the opinion that the Common Council had no power to give Sharp and his associates the exclusive use of the road in perpetuity, and for that reason he considered the whole ordinance void.

The same resolutions or ordinance were again passed upon by the Court of Appeals and the former decision was followed.

Milhau vs. Sharp, 27 N. Y., 611.

In the meantime the Legislature of the State passed an act authorizing certain persons to build a street railway upon certain streets in the City of New York which were enumerated in the act.

Held, that the streets of the city, being publici juris, were under the unqualified control of the Legislature, and neither the city nor the adjoining proprietors were entitled to compensation.

People vs. Kerr, 27 N. Y., 188.

Davis vs. New York, and Milhau vs. Sharp were followed in a subsequent case in New York.

Coleman vs. Second Av. R. R. Co., 38 N. Y., 201.

In 1874 the people of the State of New York adopted the following constitutional amendment, which, in its legal effect on street railway grants, is not essentially different from the provisions of the Michigan Constitution of 1850.

"Sec. 18. The Legislature shall not pass a private or local bill in any of the following cases: * * * Granting to any corporation, association, or individual the right to lay down railroad tracks. Granting to any private corporation, association or individual any exclusive privilege, immunity or franchise whatever. * * * The Legislature shall pass general laws providing for the cases enumerated in this section, and for all other cases which, in its judgment, may be provided for by general laws. But no law shall authorize the construction or operation of a street railroad, except upon the condition that the consent of the owners of one-half in value of the property bounded on, and the consent also of the local authorities having control of that portion of a street or highway upon which it is proposed to construct or operate such railroad, be first obtained, or, in case the consent of such property owners cannot be obtained, the general term of the Supreme Court, in the district in which it is proposed to construct, may, upon application, appoint three commissioners, who shall determine, after a hearing of all parties interested, whether such road ought to be constructed or operated, and their determination, confirmed by the Court, may be taken in lieu of the consent of the property owners."

The Broadway Surface Railroad Company was organized under a general law, and under the constitutional amendment of 1874, acquired by contract with the municipal authorities of the City of New York, the right to construct and operate a street railroad on Broadway in that city. The company was authorized to mortgage its property and franchises as security for loans made to it.

The company built and operated the road, and executed a mortgage thereon to secure bonds issued by it.

The Legislature, under the power reserved by the Constitution, "to amend, alter or repeal," repealed and annulled the charter of the company so that the corporation became and was dissolved.

In a suit instituted by the Attorney-General to wind up the affairs of the corporation under a statute authorizing it, the important question arose whether the local grant by the City of New York did not survive, and in perpetuity, the dissolution and death of the corporation. To obtain a determination of this question, the Attorney-General commenced a supplementary action in the name of the people of the State, and it was objected that the State had no such interest in the controversy as would enable it to maintain such a suit. The case was finally disposed of by the Court of Appeals.

People vs. O'Brien, 111 N. Y., 1.

Chief Justice Ruger, in preparing the opinion of the Court, starts out with the following instructive statement:

"It will not be unprofitable, at the outset, to recall some of the prominent incidents attending the origin and operation of the Broadway Surface Railroad Company, for the purpose of obtaining a clearer view of the situation of the parties, and their relation to the subject of the action.

"On May 13, 1884, that company filed articles of association and became incorporated as a street railroad company under the provisions of chapter 252 of the laws of 1884, a general act passed to authorize the formation of such corporations, pursuant to the mode introduced by the amendment to the Constitution of 1874. By such incorporation the company became an artificial being, endowed with capacity to acquire and hold such rights and property, both real and personal, as were necessary to enable it to transact the business for which it was created, and allowed to mortgage its franchises as security for loans made to it, but having no present authority to construct or operate a railroad upon the streets of any municipality. This right, under the Constitution, could be acquired only from the city authorities, and they could grant or refuse it at their pleasure. The Constitution not only made the consent of the municipal authorities indispensable to the creation of such a right, but, by implication, conferred authority upon them to grant the consent, upon such terms and conditions as they chose to impose, and upon the corporation the right to acquire it by purchase.

"The framers of the Constitution, evidently treating the privilege as a valuable one, which should be disposed of for the benefit of the municipality, to those who would pay the highest price for it, gave the municipal authorities the exclusive right to grant the privilege, which had theretofore been exercised by the Legislature alone, and authorized its acquisition by contract from such municipality. (In re Cable Co., 109 N. Y., 32; Mayor, etc., vs. T. & L. R. R. Co., 49 id., 657.) The subsequent legislation of the State confirms this view, for at times it has provided that such right might be sold at auction, and by chapters 65 and 642 of the laws of 1886 makes it obliga-

tory upon the municipalities to dispose of such right by public auction to the highest bidder."

After referring to some other matters not important here, the opinion continues:

"It is not claimed that the State has any legal interest in the determination of these questions, or that the receiver has not ample power at law to obtain possession of such assets as he may be entitled to, or to protect the property of the corporation from unlawful claims. It is claimed that the action is maintainable under the provisions of section 1 of chapter 310 of the laws of 1886, by virtue of the provision making it the duty of the Attorney-General, upon the dissolution of a corporation by legislative action, 'immediately thereafter to bring a suit to wind up and finally settle and adjust the affairs of such annulled and dissolved corporation.'

"The complaint shows that previous to the commencement of the action the Attorney-General had brought a suit, in accordance with the statute, to wind up the affairs of the corporation; that a receiver had been appointed therein, and that such action was still pending undetermined. It then proceeds to allege that in consequence of various enumerated difficulties in obtaining possession of the property by the receiver, this action was brought, 'in aid of the former action to prevent a multiplicity of suits and to carry out the provisions of chapter 310 of the laws of 1886.'

"It is not easy to see on what theory such an action can be maintained. The State has no interest entitling it to intervene to prevent a multiplicity of actions between other parties. Neither does the action seem necessary or proper in aid of the former action.

"The mode by which the provisions of chapter 310 are to be carried out are specially provided by that act to be through the instrumentality of a receiver, and it is not

claimed that the receiver lacked power to litigate and settle any of the questions presented by this complaint. The receiver might, perhaps, have brought an action similar in character to this, and would have had a legal interest, if any, in the property to be affected by it; but the State has no such interest, and has no greater authority to intervene in the litigation of controversies between individuals and corporations than any other indifferent party. (People vs. Booth, 32 N. Y., 397; People vs. Ingersoll, 58 id., 13; Matter of the N. Y. Elevated R. R., 70 id., 339; People vs. B., F. & C. I. R. R. Co., 89 id., 93; People vs. A. & S. R. R. Co., 57 id., 161.)"

The first case cited is especially apropos, and adds significance to the language of Chief Justice Ruger. There was a controversy in the City of New York about the possession and control of the fire department of the city, and the Attorney-General commenced a suit in the name of the people of the State to determine the question. The Court of Appeals dismissed the case, for the reasons stated by the Court as follows:

"The corporation of the City of New York has abundant capacity to maintain suits to defend its property and possession; and it is questionable whether any lack of diligence in the exercise of this part of its power has ever been manifested. But, however wanting in energy its spirit of litigation may be, the plaintiffs are not called upon to incite the city to activity, nor to become the voluntary champion of its wrongs, whether real or imaginary. The people of the State, like all other parties to actions, must show an interest in the subject matter of the litigation to entitle them to prosecute a suit, and demand relief. This they have utterly failed to do in this case, and, for that reason, the complaint ought to have been dismissed by the courts below."

People vs. Booth, 32 N. Y., 397.

As heretofore suggested, there is but little difference in legal effect between the provisions of New York Constitution and those of Michigan, and it is, therefore, not at all surprising that the Supreme Court of Michigan should have reached precisely the same conclusion on the question whether the State has any interest whatever in a local street railway grant.

In Maybury vs. Mutual Gas Co., 38 Mich., 154, the city of Detroit made a grant to a gas company in which it was stipulated that the grantee should not enter into any combination with, or sell out to, any other gas company, and if it did so the consent granted should cease and become null and void.

The company violated this stipulation, and the city made an application for leave to file an information to deprive the company of its franchise, as it was claimed to be, of laying gas pipes in the streets.

In denying the application, the Court, in an opinion by Campbell, C. J., among other things, said:

"But the permission to lay these pipes does not differ in any respect from that required for laying railways over land, or ditches through it. It is not a State franchise, but a mere grant of authority, which, whether coming from private owners, or public agents, rests in contract or license, and in nothing else. A violation of the contract, or an unauthorized intrusion, must be redressed as all ordinary wrongs are redressed, by the usual legal remedies. It in no way concerns the State whether the power is granted or withheld, nor whether the corporation has or has not fulfilled its agreements. The injured party has a remedy for any grievance, but the State is no more interested than it would be in the question whether or not a railroad company has lawfully acquired its right of way. This Court has heretofore refused to recognize the encroachment of a corporation on a highway as sub-

ject to be reached by quo warranto, and we discover no better reason for interfering in the present case."

And the same rule has been applied to street railway grants.

People vs. Fort Wayne & Elmwood Ry. Co., 92 Mich., 522.
Attorney General vs. Detroit Suburban Ry. Co., 96 Mich., 65.

If the local authorities acted as the agents of the State Legislature, it is plain to be seen that the State as the principal would be an interested party, and the only party entitled to a remedy in the courts.

The Constitution of Wisconsin contains no provisions relegating the control of the public highways to the municipalities of the State, and the legislation in that State relative to street railways proceeds upon the theory that the municipal ordinances granting the use of the streets are to be considered as laws of the State, passed by the local authorities as agents of the State, and in the exercise of a part of the legislative power of the State.

In a case that arose in that State, an information in the nature of a quo warranto was filed against a street railway company for the purpose of vacating the charter and annulling the existence of the corporation, and for the appointment of a receiver to wind up its affairs, for alleged violations of the municipal ordinance under which it was using the public streets.

The Court held that the information would lie.

State vs. Madison St. R. Co., 72 Wis., 612.

The legislation and the reasoning of the Court are both shown by the following extracts from the opinion of the Court, pp. 618-620:

"By the peculiar provisions of our statute under which the defendant became incorporated, there does not seem

to be any doubt but that this ordinance, which conferred upon the company these privileges and franchises, has the force and effect of a statute of the State, and is essential to its very corporate existence.

"But the ordinance has the force and effect of a law of the State by the terms of the statute itself. All such ordinances are declared by the charter to have such effect, and it has such force and effect by becoming a part of the statute by its own terms, and is embodied in it.

"By Sec. 1862, R. S., 'corporations for constructing,' etc., 'street railways may be formed under chapter eighty-six, and shall have powers and be governed accordingly. Any municipal corporation may grant to any such corporation, under whatever law formed, such use, and upon such terms as the proper authorities shall determine, of any streets within its limits, for the purpose of laying single or double tracks, and running cars thereon, for,' etc. Every such road shall be constructed upon the most approved plan for such roads, and shall be subject to such reasonable rules and regulations, and the payment of such license fees as the proper municipal authorities may by ordinance from time to time prescribe. This statute requires obedience to such an ordinance. A violation of the ordinance is a violation of the statute.

"The Common Council, in passing the ordinance, acted as the agent of the State, and as public officers by virtue of such delegated authority. The streets are for the public use, and so also are the street railways, affording increased advantages and facilities to the public, and they are primarily under the control of the Legislature, and the power of the municipalities in respect thereto is entirely derived from the Legislature.

"What the Common Council does within that power is done by the Legislature through its agency."

V.

In view of the constitutional powers and rights of municipal corporations in Michigan, and the fact that in making street railway grants they act for themselves, and not as the agents of the State Legislature under delegated authority, it is an invulnerable legal proposition that they can make such grants exclusive for a limited term of years.

There are a number of cases where exclusive grants have been held void, but in each and every one of them the Court has disposed of the question as one of delegated authority, and has inquired simply whether an exclusive grant was within the power and authority conferred upon the municipality by the Legislature.

> **Saginaw Gas Light Co. vs. Saginaw, 28 Fed. Rep., 529.**
> **Grand Rapids, etc., vs. Grand Rapids, etc., Co., 33 Fed. Rep., 659.**
> **Birmingham, etc., Ry. Co. vs. Birmingham St. Rv. Co., 79 Ala., 465.**
> **Parkhurst vs. Capital City Ry. Co., 23 Oreg., 471.**

Other cases, although proceeding on the very same theory of delegated power, have sustained exclusive grants for a term of years.

> **Newport vs. Newport Light Co., 84 Ky., 166.**
> **Des Moines, etc., Co. vs. Des Moines, etc., Co., 73 Ia., 513.**

The conflict between these two classes of cases is not very important in the case at bar, for the reason that in

Michigan, as we have conclusively shown, the question is not one involving the mere construction of a statutory delegation of authority, but is one of constitutional interpretation and original power. The question is whether under the constitution and laws of Michigan the Common Council of the City of Detroit and the Detroit City Railway had power to make Section 2 of the Ordinance of November 24, 1862, a part of their contract.

There is no material legal difference between the power to make an exclusive street railway grant and the power to make a perpetual one.

In People vs. O'Brien, 111 N. Y., 1, hereinbefore cited, the constitutional and statutory provisions were substantially the same as those involved in the case at bar, and it was held that the grant made by the City of New York to the Broadway Surface Railroad Company was a grant in perpetuity; that it was valid; and that it survived the dissolution of the corporation.

At p. 40 the Court says:

"When we consider the mode required by the statutes and the Constitution to be pursued in disposing of this franchise, the inference as to its perpetuity seems to be irresistible, for it cannot be supposed that either the Legislature or the framers of the Constitution intended to offer for public sale property the title to which was defeasable at the option of the vendor, or that such property could be made the subject of successive sales to different vendees as often as popular caprice might require it to be done.

"Neither can it be supposed that they contemplated the resumption of property, which they had expressly authorized their grantee to mortgage and otherwise dispose of, to the destruction of interests created therein by their consent.

"We are, therefore, of the opinion that the Broadway Surface Railroad Company took an estate in perpetuity in Broadway through its grant from the city, under the authority of the Constitution and the act of the Legislature. It is also well settled by authority in this State that such a right constitutes property within the usual and common signification of that word. (Sixth Ave. R. R. Co. vs. Kerr, 72 N. Y., 330; People vs. Sturtevant, 9 id., 263.)"

The constitutional provision in New York has already been quoted in full in this brief. It contains no limitation upon the power of the local authorities in fixing the terms and conditions on which they will give their consent to the construction of a street railway. I will now quote Section 3 of the act under which the Broadway Surface Railroad Company was incorporated for the purpose of showing that no statutory limitations are placed upon the local power:

"Any company organized as aforesaid, or any existing street surface railroad company or corporation hereafter organized for the purpose of building and operating a street railroad, may construct, maintain, operate, use and extend a railroad or branches on the surface of the soil, through, upon and along any of the streets, avenues, roads or highways of such cities, towns and villages, and also through, along and upon any private property which said company may acquire for the purpose, and may also construct such switches, sidings, turnouts and turntables and suitable stands as may be necessary for the convenient working of such road; provided that the consent in writing of the owners of one-half in value of the property bounded on, and the consent also of the local authorities having control of that portion of a street or highway upon which it is proposed to construct or operate such railroad be after the passage of this act first obtained. The con-

sent of such owners shall be acknowledged as are deeds entitled to be recorded. In any city the Common Council acting subject to the power now possessed by the Mayor to veto ordinances, and in any village the Board of Trustees shall be the local authorities to give all the consents required under this act in respect of such city or village. Provided, that where in any city the exclusive control of any street, road, highway, avenue or property which is to be used or occupied by any such company is, by law, vested in any local authority other than the Common Council of such city, the consent of the local authorities, in whom such exclusive control is so vested, shall be also obtained."

Laws of New York, 1884, p. 310.

Sec. 7 of the same act provides that the local authorities may, at their option, sell the franchise on any route at auction, and that the notice of sale shall contain "the conditions upon which the consent of the local authorities to the construction, maintenance, use, operation, or extension of a surface street railroad thereon will be given."

The Michigan Constitution places no restrictions on the local power, and leaves the whole subject of the terms and conditions to the local discretion, without any express limitations, and with only such implied ones as are inherent in the subject matter. Our statutory provisions are framed in recognition of the constitutional power of the local authorities, and expressly authorize them to fix and determine the terms and conditions on which they will grant the local consent.

Limitations upon the local power, therefore, must be found elsewhere than in the constitution or the statutes.

At this point it is advisable to examine the cases in which exclusive grants have been held invalid, and ascertain the grounds on which they rest.

In Saginaw Gas Light Co. vs. Saginaw, 28 Fed. Rep., 530, an exclusive grant was made to a gas light company to use the streets for laying gas pipes. Neither the city nor any private customer was obliged to buy gas from the company, so that it was perfectly competent for the city to light the streets with any other method of lighting, such as naphtha, kerosene, or electricity.

The city subsequently made a grant to an electric light company, permitting it to use the streets for the erection of poles, running of wires, etc.

It was claimed that this grant impaired the contract with the gas company within the meaning of the Constitution of the United States, and United States District Judge Brown sustained the Federal jurisdiction on the ground that the local authorities, in fixing the terms and conditions of the grant, were acting for the State, and the case was the same "as if the two companies received their entire power and franchises directly from the State."

He also said:

"But if the authority exercised be that of the State itself, whether acting directly through its Legislature, or indirectly through a subordinate body, to which the Legislature has delegated a portion of its power, it is competent for this Court to inquire whether it has exceeded its authority and violated the constitutional provision in question."

Examining the question whether the exclusive grant to the gas company excluded electric lighting and electric light companies, the learned judge held that it did not, and while he also expressed the opinion that it was invalid so far as it undertook to exclude other gas companies, the opinion was based entirely on the theory that the local authorities acted under authority delegated to them by the Legislature, and which might have been exercised by the Legislature itself.

In Birmingham, etc., vs. Birmingham, etc., Co., 79 Ala., 465, an exclusive grant in perpetuity was made to a street railway company, and the Court held that the municipality had no statutory authority to make such a grant, and if the statutes had conferred any such authority, they would conflict with a constitutional provision prohibiting the General Assembly from "making any irrevocable grants of special privileges or immunities."

As this provision could not apply to local grants except on the theory that the local authorities acted as the agents of the General Assembly, it is plain to be seen that the case is without force or authority in Michigan.

In Parkhurst vs. Capital City Ry. Co., 23 Oregon, 471, the Court went so far as to hold that the city of Salem had no authority to grant the exclusive use of particular streets so as to prevent parallel lines on the same streets; but this goes so much beyond reason and authority that the case is only valuable as showing the length to which the doctrine of a strict construction of a delegated power may be carried.

The Oregon case is in conflict with the practical result in a recent case in Indiana.

Indianapolis, etc., Co. vs. Citizens', etc., Co., 127 Ind., 369.

The case of Gale vs. Kalamazoo, 23 Mich., 344, is a typical one of delegated power and strict construction.

The right to maintain a public market is a State franchise that must emanate from the Legislature; and the village of Kalamazoo had been authorized by the Legislature to establish and maintain public markets. Instead of building a market house itself, the village entered into a contract with George H. Gale to build one, and in this contract it agreed to exercise its legislative power as stipulated in the contract. The Court held the contract

was beyond the power of the village, and Judge Cooley, in stating for the Court the substance of the contract, said:

"The contract in question, however, is not only entered into in pursuance of an exercise of legislative authority on the part of the village, but it undertakes to control that authority in several important particulars:

"1. It requires the appointment of a competent manager or clerk to attend to, and supervise, the market-house, and to require the observance of the ordinances and by-laws relative to the marketing within the village. For this purpose legislative action would have been essential, and must consequently have been within the contemplation of the parties when the contract was made.

"2. It binds the authorities not to permit any other market-house, provided the one erected by the plaintiff should prove large enough to accommodate the public; and

"3. It undertakes that the authorities shall restrain the ordinary marketing within defined bounds.

"In each of these particulars this contract differs widely from one which should merely put the city in possession of a market-house to be controlled and disposed of according as subsequent circumstances should appear to render desirable."

The fact that these cases of delegated power do not apply to the case at bar is well illustrated by the State vs. Cin. Gas, etc., Co., 18 Ohio St., 262, where an exclusive grant was made to a gas company, and it was held to have been unauthorized by the Legislature; but the decision was put on the express ground that the right to use the public streets of the city was a franchise which could only emanate either directly or indirectly from the Legislature. The action was an information in the nature of a quo warranto, so that the case is in conflict with the settled law of Michigan on this subject.

The case of Norwich Gas Light Co. vs. Norwich City Gas Co., 25 Conn., 19, is one where a local grant in terms exclusive, had been made exclusive by a subsequent act of the Legislature, and the Court held the act unconstitutional on general principles, because it created a monopoly and was in conflict with the provision of the Connecticut Bill of Rights, that "no man or set of men, are entitled to exclusive public emoluments or privileges from the community."

In concluding our comments on the cases holding exclusive grants invalid, we desire to quote from the opinion of United States Circuit Judge Jackson in Grand Rapids E. L. & P. Co. vs. Grand Rapids E. E. L. & F. G. Co., 33 Fed. Rep., 659, as it contains a correct statement of our position, as well as a full and complete recognition of its entire accuracy.

In that case an exclusive grant for fifteen years was made to an electric light company, and before the fifteen years expired a conflicting grant was made to another electric light company.

The Federal Court took jurisdiction of the case on the theory that the Common Council of Grand Rapids acted as the agent of the Legislature in making these grants, which is of itself a sufficient explanation of the decision of the Court, holding the exclusive grant void; but Judge Jackson, in his opinion, makes the following clear and discriminating statement of the case as he understood it, and of the principles with which it was surrounded:

"The present case involves no consideration of the power of the Legislature to have conferred upon the complainant the exclusive right which it claims to the use of the streets of Grand Rapids for the purpose of laying down electric wires. It is conceded that the Legislature of Michigan, subject to the constitutional reservation of the right to amend, alter or repeal its charter, could have

directly conferred upon the complainant the exclusive privilege of occupying the streets of the city for the distribution of electric light for public and private use. It is also conceded that the Legislature, subject to the same constitutional reservation, had the authority to confer upon the Common Council of Grand Rapids the power to grant the same exclusive right; and the question is, has it delegated such authority to the city or its Common Council in the powers with which it had invested it or them? It is manifest that this question is not controlled by such cases as Gas Co. vs. Light Co., 115 U. S., 650, 6 Sup. Ct. Rep., 252; Water Works vs. Rivers, 115 U. S., 674, 6 Sup. Ct. Rep., 273; Gas Co. vs. Gas Co., 115 U. S., 683, 6 Sup. Ct. Rep., 265; Water Works vs. Water Works, 120 U. S., 64, 7 Sup. Ct. Rep., 405; Slaughter-House cases, 16 Wall., 36, and similar cases relating to legislative grants of exclusive privileges, to be exercised within the limits of municipal corporations. These cases, however, establish one important principle, which has a direct bearing, and throws light upon the question here involved, and that is, that a municipality, under the usual powers conferred of providing a supply of light and water for the city and its inhabitants, and of establishing and regulating its streets, does not possess the exclusive authority over those subjects; that, notwithstanding the grant of such powers to a municipal corporation, the State, in whom rests the paramount rights to, and control over, all franchises and all public highways, may exercise its sovereign authority over all such subjects, and confer rights and privileges exclusive or not, as it may deem proper within the limits of the municipality. These legislative grants of special franchises, whether exclusive or not, to be exercised in cities, are not sustained, nor do they rest upon any implied repeal of powers previously delegated to the municipal corporation; but they are sup-

ported upon the ground of sovereign right and authority which has never been parted with by the State.

"To confer exclusive rights and privileges, either in the streets of a city or in the public highways, necessarily involves the assertion and exercise of exclusive powers and control over the same. Nothing short of the whole sovereign power of the State can confer exclusive rights and privileges in public streets, dedicated or acquired for public use, and which are held in trust for the public at large. This brings us directly up to the inquiry whether the Legislature of Michigan has delegated to the City of Grand Rapids the State's sovereign power and control over the streets of that municipality. If the charter powers of the city have invested it or its Common Council with the whole sovereign power and exclusive control over the streets within its limits, it might lawfully confer upon the complainant the exclusive right of user, which the ordinance of 1880 undertook to grant. If, however, the city or its Common Council possessed no such exclusive power and control, then the grant which it attempted to make to complainant was 'ultra vires,' and, therefore, void so far as it purports to confer exclusive privileges in or over the streets of the city."

It is certain that if Judge Jackson had known that the Constitution of the State had transferred the whole sovereign power of the State over public streets and highways to the local authorities he would have reached a different conclusion as to the validity of exclusive grants. It would seem from the language used by the learned judge that the counsel who argued that case made concessions which were unwarranted, because nothing can be clearer than that the Legislature of Michigan has no power to grant an exclusive or any other right to use the streets and highways for any purpose.

We will now refer to the two cases hereinbefore cited where exclusive grants made by the local authorities in virtue of a delegated power were sustained.

In Newport vs. Newport Light Co., 84 Ky., 166, the gas company was invested in express terms by a provision contained in its charter with the right "to furnish any city, town, district, corporation or locality, or any public institution, manufacturing establishment, or private premises with gas or other light, for such time and on such terms as may be agreed upon by the parties."

The charter of the city authorized the municipality "to construct, maintain and operate gas works, and to pass all ordinances necessary to regulate the same."

In consideration that the company would construct gas works, and would furnish gas to the city and to private consumers of a certain quality, and at certain fixed prices, the grant to the company was made exclusive for twenty-five years.

Held, that the exclusive grant was valid.

In Des Moines Street R. R. Co. vs. Des Moines B. G. Street Ry. Co., 73 Ia., 513, a section of the code gave the City Council of Des Moines "power to authorize or forbid the location and laying down of tracks for railways and street railways."

In determining whether the Council had authority under this clause to grant the exclusive right to use the streets of the city for a limited number of years, the Court said:

"It may be conceded that the future growth and wants of a city cannot be foreseen. The most that can be said is that they may ordinarily be predicted with reasonable approximation for a limited time. From this we are inclined to think it follows that an ordinance providing for an exclusive right in perpetuity, however necessary it might be to contract for the service involved in the exer-

cises of the right, would be unreasonable, and might be declared void. In Dill. Mun. Corp., Sec. 715, the author, commenting upon Davis vs. Mayor of New York, 14 N. Y., 506, says:

"'The judgment of the Court rests upon the sound principle that the powers of a corporation, in respect to the control of its streets, are held in trust for the public benefit, and cannot be surrendered or delegated by contract to private parties; and hence the resolution of the City Council, authorizing private persons to construct and operate a railroad upon certain terms, without power of revocation, and without limit as to time, was not a license or act of legislation, but a contract, void, however, because, if valid, it would deprive the corporation of the control and regulation of its streets.'

"In the case at bar the time limited was thirty years, which does not seem to be unreasonable, and especially in view of the fact that the lines were operated at a loss for fourteen years. Possibly thirty years, or any shorter time, should be deemed too long in any case, if the contract were such that the street railroad company could not be required to meet the public wants as the same should arise. In the case at bar, two miles only of track were specially stipulated for, but it is not denied by plaintiff that the acceptance of the ordinance which allowed its assignor to lay a track upon all the streets raised an implied contract upon the part of its assignor to lay so much track as reasonably might be demanded by the public. At the time of the commencement of this controversy, the plaintiff and its assignor had, in fact, laid ten miles of track, and was contemplating the laying of still more. It may be that neither the plaintiff nor its assignor did all that it should; but such a question is not before us. The ordinance appears to us to be reasonable; and our holding is that, under our statute, which empowers cities to au-

thorize or forbid the laying down of a street railroad track, a City Council may make a reasonable provision by contract for present and future street railroad service, and may secure the company contracted with against the impairment of its profits for a limited time, and against interference with its extension during the time, if a larger and better or more immediate service can be thus obtained."

VI.

The Legislature of Michigan has conferred on cities and villages general power to agree with street railway corporations on the terms and conditions on which they may be permitted to make use of the streets, and in view of the constitutional policy of the State which we have considered, it is clear this authority includes the power to make such a grant exclusive or perpetual if the interests of the municipality, in the judgment of the local authorities, can be best subserved thereby.

Conceding for the purposes of the argument that the local right to control the streets is dormant under the Constitution until life is put into it by the Legislature, then the question in dispute in this case presents itself in three different stages:

1. The constitutional power of the local authorities being dormant is not the creation of a township or village or city sufficient to bring it into full force? Whenever the Legislature creates a local government, does not the Constitution of the State clothe that government with full control of the public highways without special authorization by the Legislature?

2. If special authority is necessary, need it consist of anything more than the general power usually conferred on municipal corporations to improve and maintain public highways, and to control and regulate their use and enjoyment by the public? Must not any such general authority receive a much broader and more liberal construction under the Constitution of Michigan than would obtain in States where the Legislature has full control and the local authorities act as its agents and not in their own right?

3. The Legislature having expressly authorized the municipal authorities, without any limitation whatever, to agree on the terms and conditions of these local grants, is there any possible escape from the proposition that in Michigan the power conferred is just as broad as that of the Legislature would be if the Constitution of the State had left that body in possession of the supreme authority over the streets and highways formerly exercised by it, and is still exercised in most of the other States?

The case we have in hand, therefore, calls for a construction of the power conferred on the municipal authorities to agree on the terms and conditions, and the logical and legal effect of the Constitution of the State of Michigan is to resolve all doubts that might otherwise exist on the question whether this general authority confers power to make these local grants exclusive or perpetual.

VII.

Considered either as an exercise of delegated or of original power, it was competent for the Common Council of the City of Detroit to agree with the Detroit City Railway that it and its successors and assigns should have the first right to build extensions and new routes as provided in section 2 of the ordinance of November 24th, 1862.

Whatever may be the general rule as to the strict construction of a delegated power of this kind, this much is certain, that where the Legislature confers on a municipality an untrammeled power to fix and determine the terms and conditions on which it will grant its own consent to the construction and operation of a street railway, the question whether the terms and conditions of any particular grant are valid or not depends on the facts and circumstances of each case, and there are no arbitrary and unyielding rules of law, formulated by the courts, which are applicable to the subject.

This being so, before jumping to the conclusion that the provisions of Section 2 of the Ordinance of 1862 are invalid, it is wise and proper that we should, in the first place, look at the question in retrospect.

If the Court will turn to Rec., p. 122, your honors will see that an ordinance substantially the same as the ordinance of November 24th, 1862, was approved May 24th, 1862, and that the grantees therein named were H. K. Sanger, R. N. Rice, J. W. Kelsey, John J. Harris, John H. Wiggins, Amos B. Merrill and John L. Lawrence.

On p. 127 will be found the following notice:

"Controller's Office:

Detroit, August 29th, 1862.

Street Railways—In pursuance of a resolution of the Common Council, the undersigned will receive sealed proposals during the ensuing thirty days for constructing the street railways specified in the ordinance entitled 'An ordinance to permit certain persons to establish and locate street railways in and through the streets of the City of Detroit.' The names of the corporators in said ordinance have been stricken out by the Common Council, and the time for the completion of said railways is extended eight months. Copies of the ordinance will be furnished on application.

D. C. WHITWOOD,
Controller."

On the same page will be found the Controller's report:

"Detroit, September 30th, 1862.

To the Hon. The Common Council:

Gentlemen—Herewith I respectfully submit the only proposal that has been received for constructing our street railways. It is from C. S. Bushnell. Accompanying it is a letter of E. N. Wilcox, Esq., the attorney of Mr. Bushnell, and which I have deemed it pertinent to place before you. The City Attorney has marked out on the map, in this office, the respective points to which Mr. Bushnell's proposal would carry the roads; and an inspection of the map will give the Council a correct idea of the distances.

D. C. WHITWOOD,
Controller."

If the Court will now turn to Sec. 3528, How. Stat., you will see that between the date of the approval of the ordinance of November 24, 1862, and its acceptance, May 9, 1863, viz.: On February 18, 1863, the train railway act was

amended so as to authorize street railway corporations organized under it to execute mortgages "to borrow money for the purpose of constructing and operating the road or roads proposed to be constructed by them."

This history gives us some little idea of the difficulties which had to be overcome in order to induce the investment of the capital necessary to inaugurate the street railway system of the Detroit City Railway.

It appears that the provisions of Section 2 were a part of the advertised terms and conditions on which proposals were solicited by the city, and upon which Mr. Cornelius S. Bushnell and his associates made the proposal which was finally accepted, and acted upon by the parties.

In 1862 the center of the business portion of the city was the corner of Woodward and Jefferson avenues, and it will be observed that it is provided in section two "that the railways on Grand River street, Gratiot street and Michigan avenue shall run into and connect with the Woodward avenue railways in such direction that said railways shall continue down to, and form, each of them, one continuous route to Jefferson avenue."

It is self-evident that with these great diagonal lines on Michigan, Grand River and Gratiot avenues, running through the city to the business center, it was of the utmost importance to the people of Detroit that all extensions and new routes should, so far as possible, run into these diagonal lines, as furnishing the shortest and most direct routes to the Campus Martius and the business center.

With the city so laid out and so situated, was it not clearly competent for the Common Council to agree that the Detroit City Railway should have the first option to build extensions and new routes?

Were not the people of the City of Detroit as much interested as the street railway company in having one general street railway system built up for their benefit and accommodation?

Can any one conceive of more reasonable and sensible terms and conditions than those contained in section two?

There can be no better proof of the intelligence displayed by the parties in agreeing to section two than the zig-zag and indirect routes by which the defendants propose to furnish street railways to those portions of the city which are naturally tributary to the main lines now owned and operated by the complainant.

The ordinance of December 4, 1894, provides for somewhat cheaper fares, but that is offset by the provisions putting the entire burden of the paving between the tracks and rails on the city or the abutting proprietors; and to whatever extent the terms and conditions of the ordinance are more favorable to the city than the ordinance of November 24, 1862, as amended, they are more than overcome by the disadvantages resulting from the want of connections with the railways of the complainant.

The truth is, the entire railway system of the city should be operated and controlled by one company; and it is equally true that, however much the city may seek for competition between rival companies, sooner or later their financial necessities will compel them to amalgamate or combine.

Such has been the experience of the City of Detroit with rival gas companies, and such has been the universal experience elsewhere; so that there is no practical reason which should lead this Court into a departure from the law and justice, by a decision, the only object and purpose of which would be to find some way by which the City of Detroit can repudiate a contract honestly and fairly en-

tered into, and acted upon by the parties for more than thirty years.

Considering the question in the light of the undoubted constitutional rights and powers of municipal corporations in the State of Michigan, there can be but one answer:

VIII.

The Detroit Railway has made an admission and concession in this case which illustrates the practical wisdom and good sense of section 2 of the ordinance of November 24, 1862.

The Detroit Railway ordinance was approved December 4, 1894, and a month later the biennial session of the State Legislature for 1895 began.

Early in the session the Detroit Railway caused a bill to be introduced, a copy of which is in evidence (Rec., 116-122).

The object and purpose of the bill appears from the testimony of Mr. Henry A. Everett, a large stockholder and one of the officers of the Detroit Railway (Rec., 82-90).

The first section of the bill is as follows:

"Section 1. The People of the State of Michigan enact, Whenever any street railroad company in the City of Detroit, authorized to operate street railway lines therein, shall desire the use of any of the roads, tracks, poles and wires of any other street railroad company, situated within the territory in said city bounded on the west side by Third street, on the north by Beech street and Adams avenue, on the east by St. Antoine street, and on the south by Detroit river, it shall be competent for such company to petition the Common Council of the City of Detroit for

permission to acquire the use of such part of the roads, tracks, poles and wires situated within said territory, in common with such other company upon any street which it needs to make use of for the accommodation of the traveling public, and to acquire the same under the provision of this act."

The territory described is the central portion of the City of Detroit, and the purpose of the bill was to enable the Detroit Railway, by condemnation proceedings, to make those same terminal connections with the system of the Detroit Citizens' Street Railway Company as would result if that company was accorded the first right or option granted to it by section 2 of the ordinance of November 24, 1862.

Mr. Everett's testimony and this proposed law are a complete demonstration of our proposition that the provisions of section 2 are as much in the public interest as in that of the company, and that what is attacked as illegal is founded in the best business judgment when examined from the standpoint of the people of the City of Detroit.

Indeed, the best interests of the people of Detroit will be subserved by compelling the city to live up to its contract with the Detroit Citizens' Street Railway Company.

In that way the people would get the benefit of one central system, all under one management, and subject to one municipal contract.

This contract expires in 1909, and is subject to modification before or at that time, and there is no reason why the parties should be hampered by the illegal, inequitable and speculative grant to the Detroit Railway which does not expire until 1924.

IX.

The complainant is entitled to the protection of the Federal Constitution.

This is shown by the cases cited in this brief, and it is not necessary for us to enter into an elaborate discussion of the question here.

If the local authorities, in making street railway grants, act in a legislative capacity as the agents of the Legislature, there can be no doubt but that the questions whether the provisions of section two are valid, and whether they are impaired by the ordinance of December 4, 1894, are of federal cognizance.

On the other hand, if the argument we have submitted is correct, that the local authorities exercise an original power conferred on them by the Constitution of the State, it does not follow that the complainant is not entitled to the protection of the Federal Constitution, for it is a plain proposition that the supremacy of the Constitution of the United States cannot be evaded by a State Constitution which takes a portion of the sovereign legislative power of the State from the Legislature and distributes it among the municipal corporations of the State.

The direct, or indirect, action of the Legislature of a State is not the only State action prohibited by the Constitution of the United States and the Fourteenth Amendment.

Acting as the agent of the Legislature by virtue of authority delegated by the Legislature is quite a different thing than acting as the agent of the State by virtue of authority conferred by the organic law of the State; but one is just as much State action as the other.

We submit that the complainant is entitled to the relief prayed, because "such is the mandate of the Constitution of the United States."

X.

The complainant is entitled to the relief prayed, as a matter within the discretion of a court of equity.

Courts of equity have large discretionary powers, and owe their existence to the fact that it is not always just or advisable to enforce the strict rules of the law.

In 1857, 1858 and 1859 the Legislature of this State passed a number of acts relative to the Detroit & Milwaukee Railroad in plain violation of the Constitution of 1850, but they were acted upon, and shares of stock and bonds and mortgages were issued in reliance thereon without any question until 1884, when the State, by its Attorney-General, filed an information in the nature of a quo warranto to test their validity.

Attorney-General vs. Joy, 55 Mich., 94.

After referring to the facts the Court, in an opinion by Chief Justice Cooley, among other things, said:

"For the State, under such circumstances, to take steps for the annihilation of all these shares and securities by legal decision would have all the appearance of bad faith and of public repudiation of solemn State engagements. The several acts of legislation were not, indeed, contracts; but when the State, by valid legislation, invites the public to make specific investments, it may well be said that its faith is pledged to do nothing on its part which shall have for its purpose to render the investments worthless.

"It may be said, and is said, that there can be no estoppel against the State in respect to such questions; and this is undoubtedly true. It is further said that the questions the Court is called upon to decide are purely legal

questions. But when the dignity and honor of the State are involved the judiciary has them in charge quite as much as either of the other departments of the government; one department as much as another must see that they suffer no detriment at its hands, while it is acting as representative of sovereignty within its constitutional sphere of duty. If, therefore, the appeal to the Court is to any extent an appeal to the discretion of the Court, it becomes its plain duty to see that when it speaks for the State it shall speak the voice of justice and maintain unimpaired the public faith, and it must do this even though the legislative or the executive departments were demanding something different. But in this case we do not understand that any department of the government has demanded or desired anything different, or that the people or any part of them have any wish inconsistent with public faith and integrity."

XI.

The plaintiff in error, in its bill, claims that the acts of the defendants are in violation of Sec. 10, Art. I., and the Fourteenth Amendment of the Federal Constitution. If our contention is right, that the grant to plaintiff in error was valid, then it was impaired by the grant to the Detroit Railway, defendant in error, and the case is one for review in this court.

Nagle vs. Wright, 101 U. S., 791.
City Railway Co. vs. Citizens' R. R. Co., 166 U. S., 557.

It is submitted that the decree of the Supreme Court of the State of Michigan and of the Circuit Court for the County of Wayne should be reversed and a decree entered for plaintiff in error.

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